

Retrospective payment of pension

CONDER and SECRETARY TO DSS (No. 5939)

Decided: 7 June 1990 by D.W. Muller, K.J. Lynch and J.D. Horrigan.

The AAT *affirmed* a decision of the DSS that Conder's age or invalid pension could not be restored for the period 1 July 1986 to 30 June 1987 following Conder's lodgment of a claim seeking that restoration on 14 July 1987.

Conder had been paid an invalid pension between June 1981 and March 1985, when the introduction of the assets test led to the DSS deciding that Conder was no longer eligible for payments of invalid pension.

On 14 July 1987, Conder wrote to the DSS, advising that she and her husband had suffered losses and accumulated substantial debts in operating their farm business and seeking restoration of her pension for the financial year 1986-87. Although an earlier version of the *Social Security Act* had provided, in s.135TJ(3), that the Secretary could increase the rate of a person's pension with effect from any date specified by the Secretary, s.135TJ was amended with effect from 1 July 1986, so as to provide that any determination made under s.135TJ(3) to increase the rate of a person's pension could only take effect from the day on which the Secretary received advice from the person which led to the decision to increase the rate of pension: s.135TJ(4)(c). [These provisions now appear in s.168(3) and (4) of the *Social Security Act*.]

The AAT said that, because of these provisions, there was no legal basis on which Conder could be paid pension for the financial year ending 30 June 1987, because she had advised the Secretary of the change in her financial circumstances after the end of that period. The AAT commented:

'The amendments to the Act [which took effect from 1 July 1986] create difficulties for people who operate farming or business ventures and who qualify for pensions because of their age or their physical handicaps. In some cases, it may be virtually impossible to inform the Department of any change in financial circumstances until the end of each financial year. A crop may fail or prices may in fact turn out to be a lot lower than anticipated. The value of the farm or a business will very often depend on the income that it can generate. Mrs Conder's case highlights those difficulties.'

(Reasons, para. 15)

[P.H.]

Sickness benefit: loss of income

WEBB and SECRETARY TO DSS (No. 5952)

Decided: 7 June by J.A. Kiosoglous.

Webb, a self-employed full-time farmer, suffered ill health because of a schizophrenic disorder which first appeared in October 1985. He applied for sickness benefit in May 1987. Tax returns revealed the farm ran at a loss during the 1987-88 financial year and during the previous financial year.

Medical evidence indicated that, during the period under review, Webb was unable to work because of his illness. The DSS agreed that the applicant was incapacitated in terms of being eligible for sickness benefit but there was an onus on him to show that the incapacity caused the loss of income. The DSS argued the property was not capable of returning an income whether or not Webb was there.

The legislation

Section 117(1)(c)(i) of the *Social Security Act* provides that a person is eligible for sickness benefit if he satisfies the DSS that he was incapacitated for work throughout the period by reason of sickness, the incapacity was of a temporary nature, and he had thereby suffered a loss of salary, wages or other income.

The decision

The Tribunal agreed the incapacity could be regarded as 'temporary' and that Webb was unable to work during the relevant period. It accepted that he had suffered a loss of income as a result. It seems that the AAT took into account that Webb's sales of barley (his major crop) were as follows in the relevant years:

1985-86:	\$12 457
1986-87:	\$6696
1987-88:	\$1949.

[B.W.]

Claim for pension: no power to back-date payment

FRY and SECRETARY TO DSS (No. 6024)

Decided: 12 July 1990 by D.H. Burns.

Alice Fry arrived in Australia from the United Kingdom on 21 June 1982. On 25 June 1982 she applied for an age pension which was granted with effect from 1 July 1982.

On 22 December 1988, the DSS decided, after an administrative review of Fry's case, to transfer her from age pension to widow's pension, with effect from 15 September 1988.

Fry asked the DSS to back-date her widow's pension to 21 June 1987, the date when she would have been eligible to receive that pension had she lodged a claim for it. When the DSS refused to do this, she asked the AAT to review that refusal.

The legislation

Section 158(1) of the *Social Security Act* provides that the payment of a widow's pension is not to be made, 'except upon the making of a claim for that pension'. According to s.159 of the Act, a claim for a pension is to be in writing in accordance with a form approved by the Secretary and lodged at an office of the DSS or other place approved by the Secretary.

These provisions were formerly numbered as ss.135TA and 135TB and were in force at the time when Fry first became eligible to claim widow's pension in June 1987.

Estoppel

On behalf of Fry it was argued that the DSS could not raise the provisions of ss.158 and 159 of the *Social Security Act*. It was argued that, because the DSS had granted Fry a widow's pension as if she had claimed that pension, the DSS was estopped from raising ss.158 and 159.

The AAT referred to the Full Federal Court's decision in *Formosa* (1988) 45 SSR 586. In that case, the Federal Court had said that estoppel could not be used to lift the prohibition imposed by s.158(1), so as to allow for payment of a pension without the lodging of a claim:

'... estoppel does not operate so as to sanction the appropriation of public moneys without the authority of the Parliament ...'